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NON-TARIFF BARRIERS (NTBs) TO INTERNATIONAL TRADE IN AGRICULTURAL COMMODITIES: TECHNICAL AND SANITARY ASPECTS

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4 August 1999

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INTRODUCTION

The *Agreement on Agriculture* resulting from the Uruguay Round of negotiations significantly affected international trade policies on agricultural commodities. For example, the new tariff system made trade more transparent by changing import-restricting measures such as quotas into customs tariffs subject to minimum market access. (1) However, some international organizations, such as the Organisation for Economic Co-operation and Development (OECD), have noted that, as a result of these scheduled reductions in customs tariffs, NTBs could become the main hindrances to international trade in agricultural commodities.

Domestic food safety regulations have been identified as a particular source of protectionism. In Europe, for example, the moratorium on certain Genetically Modified Organisms (GMOs)(2) and the ban on cattle that have been given growth hormones are NTBs that affect agriculture in Canada. This paper describes the various international agreements governing the technical and sanitary aspects of international trade in agricultural commodities, as well as ways of addressing the resulting debates and settling disputes.

INTERNATIONAL AGREEMENTS

Two main international agreements resulting from, or reinforced by, the *Agreement on Agriculture* affect the technical and sanitary aspects of international trade in agricultural commodities:

- the *Sanitary and Phytosanitary Agreement* (*SPA*); and
- the *Technical Barriers to Trade Agreement* (*TBTA*).

The *SPA*, signed as part of the Uruguay Round, came into force in January 1995 when the World Trade Organisation (WTO) was created. It covers food safety, animal health protection, and plant preservation. It defines the basic rules for ensuring a healthy food supply while preventing domestic safety and security regulations from being used as a pretext for protecting domestic production. It also authorizes countries to set their own standards, which must have a scientific basis. Countries are encouraged to use existing international standards, particularly those developed by the *Codex Alimentarius* Commission with respect to human health, the *International Plant Protection Convention* (*IPPC*) with respect to plant health, and the International Office of Epizootics (IOE) with respect to animal health. (These organizations are described in the Appendix.) However, countries may set stricter standards if these are justified on the basis of science or risk assessment, provided the approach is consistent and not arbitrary.

The *TBTA,* resulting from the Tokyo Round, has existed since 1979; its present version was established during the Uruguay Round. Like the *PSA*, it aims to ensure that domestic regulations do not create undue trade barriers. It covers all technical regulations, standards, and compliance assessment procedures, except for safety measures defined in the *SPA*; thus the *SPA* is an exception to the more general *TBTA* .

Since the scope of the *SPA* is quite specific, some measures related to human health, such as the allergenic properties of foods, may be covered by the *TBTA*. Where agriculture and agri-food are concerned, the *TBTA* covers regulations on labelling, packaging, and claims with respect to the

nutritional and allergenic properties of foods, for example. Although the *TBTA* also encourages countries to adopt international standards, unlike the *SPA* it also allows stricter standards to be justified on non-scientific grounds, including major technical problems and geographic location.

Other WTO agreements cover more specific technical problems that could constitute barriers to trade in agricultural commodities. Examples include the *Rules of Origin Agreement*, which requires member countries to adopt transparent rules of origin, and the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (*TRIPS Agreement*), which governs the use of geographic terms such as "champagne," "scotch" and "roquefort" on food products. Other non-WTO agreements may affect technical and sanitary aspects of international trade in agricultural commodities; for example, the biosecurity protocol (3) would govern transborder movements of living modified organisms such as genetically improved seed.

DISPUTE SETTLEMENT

Since the Uruguay Round, the WTO has had a dispute settlement procedure. If consultations between the countries concerned fail, the WTO Dispute Settlement Body (DSB) may set up a panel to investigate the complaint. The panel submits a report to the DSB, which makes a decision that is binding on the offending country. Although an appeal may be brought, at the conclusion of the process the losing country is required to take appropriate measures. This procedure applies to all trade disputes between two or more WTO member countries, not only to disputes about trade in agricultural commodities or the technical and sanitary aspects of such trade. The DSB, created in 1995, must promote the establishment of jurisprudence and the clarification of the terms of the *SPA* and the *TBTA*.

The *SPA* recommends that the *Codex Alimentarius* Commission, *IPPC*, and IOE standards be consulted during the settlement of international disputes involving scientific issues. Panels have used the standards of the *Codex Alimentarius* Commission to settle certain disputes, thus potentially making these standards authoritative. The best-known *SPA* and *TBTA* dispute settlement dealt with the European Union (EU) ban on the import of live animals that had been given growth hormones and the meat of such animals.

Furthermore, a March 1999 report published by the *SPA* Committee (4) points out that many disputes have been avoided by means of discussions held in accordance with the *SPA*, in particular the section on transparent implementation of sanitary and phytosanitary measures. (5) The report refers to measures taken by various countries following the spongiform bovine encephalitis ("mad cow disease") crisis, and a United States import ban placed on certain packaging materials in order to combat an Asian beetle infestation; in some cases, measures were amended after discussions at the *SPA* Committee or another forum provided for under the *SPA*.

CURRENT ISSUES

A. Interpretation of International Agreements

There is considerable debate over the accurate interpretation of the agreements resulting from the Uruguay Round. Emerging jurisprudence

on the *SPA* and the *TBTA* may clarify the limits these set and influence negotiations for their revision.

In its 1997 decision on the EU ban on the meat of animals that had been given growth hormones, the DSB relied heavily on the standards of the *Codex Alimentarius* Commission, stating that existing international standards must be accepted. In practical terms, the result has been the free circulation of any product that meets the standards of the *Codex Alimentarius* , which are now seen as authoritative and as having precedence over domestic rules. The DSB decision on appeal seems to alter the interpretation of the *SPA* and the potential role of the *Codex Alimentarius* Commission standards, although it maintains that the import ban is incompatible with certain sections of the *SPA*. The DSB decision does point out that a country may set stricter standards, provided these have a scientific basis, and suggests that a balanced scientific opinion, even a minority one, may be taken into consideration. There also seems to be a trend toward requiring countries that consider measures illegal to provide conclusive evidence of this. Although these decisions do not necessarily establish jurisprudence, they do clearly illustrate that there are various interpretations of the *SPA*.

There is also debate over the *SPA* section on risk assessment, which is required when a country adopts standards stricter than those of the *Codex Alimentarius* Commission or IOE. Although the *Codex Alimentarius* Commission has set stages for risk assessment, there is not one methodology, or any one agreement on acceptable risk levels or what constitutes acceptable risk.(6) There is a full range of opinions, from the desire to eliminate risk (by, for example, sterilizing mineral water, or banning raw-milk cheese) to the possibility of properly managing risk (by, say, bottling mineral water at source, or applying the World Health Organization (WHO) Hazard Analysis Critical Control Point (HACCP) system). Some observers point out the inconsistency of wanting to eliminate risk altogether in one sector when high risk is tolerated in other sectors.

The *SPA* clearly provides that measures taken under it must have a scientific basis: only human, animal or plant health factors - not those that are ethical, cultural or moral - may justify domestic regulations limiting imports of agricultural commodities. However, in 1997, during the *Codex Alimentarius* Commission debate on setting a Maximum Residue Limit (MRL) for recombinant bovine Somatotropin (rbST), the Netherlands moved a motion requesting a review of the consideration of legitimate non-scientific factors in setting *Codex Alimentarius* Commission standards. In fact, non-scientific factors are often seen as the means of determining whether risk is acceptable, and scientific factors only as the means of quantifying risk. In response to this motion, the *Codex Alimentarius* Commission's General Principles Committee is considering the role of scientific factors and the extent to which other factors are taken into consideration, particularly in assessing risk. Thus it is possible that, when the *SPA* is renegotiated, some countries will want to have non-scientific factors taken into consideration in justifying domestic regulations.

It is often claimed that the *SPA*, by providing that domestic regulations must be justified on available scientific bases, does not respect the precautionary principle. There are a number of definitions of this principle, which essentially states that, in the absence of scientific certainty, precautionary measures must be taken. The precautionary

principle is recognized in a number of international legal instruments, including the *Rio Declaration* and the *UN Framework Agreement on Climate Change*, and is often invoked by consumer and environmental groups. Thus some public expectations that rely on these international agreements may clash with the development of domestic regulations provided for in the agreements that govern the technical and sanitary aspects of international trade.

B. *Codex Alimentarius* Commission and Other Standard-Setting Organizations

The main fear of consumer and producer groups is that Canadian food safety standards will be lowered to correspond to international standards for facilitating trade. Thus public and national confidence in standard-setting organizations such as the *Codex Alimentarius* Commission, the *IPPC*, and the IOE is of the utmost importance if international standards are to be accepted.

Sometimes criticized are the operations of the *Codex Alimentarius* Commission and some of its advisory committees, including two of the joint expert committees of the WHO-UN Food and Agriculture Organization (FAO) — the Joint Expert Committee on Food Additives (JECFA) and the Joint Meeting on Pesticide Residues (JMPR).(7) In a March 1999 report, Canada's Standing Senate Committee on Agriculture and Forestry, noting that officials from some countries on these committees are representatives of industry, expressed concern about potential conflict of interest. As well, since experts are selected on the basis of their scientific competence, some countries are very well represented on expert committees such as the JECFA and the JMPR, and there is said to be lack of transparency in the selection of these experts. As WTO panels gradually determine the authority of the *Codex Alimentarius* Commission, controversy may arise about the representation of countries and the role accorded to industry at future trade negotiations.

The 1991 conference on food standards among the FAO, the WHO, and the General Agreement on Tariffs and Trade (GATT) noted that recognition in the proposed *SPA* of the special value of the *Codex Alimentarius* Commission's conclusions would change the status of those conclusions. The 1997 decision by the WTO panel on beef led the European Commission to criticize both the procedure used, which it claimed gave the *Codex Alimentarius* Commission's conclusions the value of standards, and the pressure exerted by economic considerations on *Codex Alimentarius* Commission and IOE experts, who ought to be neutral, since different countries do have different regulations for similar products. Debate on the scientific objectivity of the international standard-setting organizations could result, particularly since science has limitations and standards are sometimes set on the basis of technical and economic feasibility; for example, standards on radioactivity levels were set only after their effects on human health had been observed. (8) Moreover, it has been noted that *Codex Alimentarius* Commission votes reflect political, economic, and former colonial considerations as well as those that are objective and scientific.(9)

CONCLUSION

During the various rounds of the multilateral trade negotiations, efforts have been made to clarify the technical and sanitary aspects of trade in

agricultural commodities. The various agreements signed provide a framework for addressing the ensuing debates and settling disputes. Although the DSB has been fairly effective, it has also shown that various interpretations of the agreements could affect how these are renegotiated.

NTBs represent only one factor in integrating agriculture into the world economy; others are customs tariffs, domestic production support policies, and export subsidies.

APPENDIX

International Agriculture and Agri-Food Standard-Setting Organizations

International Plant Protection Convention (IPPC)

Date signed: 1952

Signatory countries: 107, as at May 1999

Type: International convention managed by the FAO

> Purposes: To ensure effective joint action to prevent the introduction and spread of parasites and diseases of plants and plant products, and to promote measures to control these parasites and diseases.
>
> Description: The goals of the *IPPC* Secretariat in Rome are to facilitate the exchange of information and to avoid the use of undue trade barriers. Its responsibilities are: to strengthen international co-operation on the *IPPC* ; to develop international standards on phytosanitary measures (for example, quarantine, and disease-free areas); and to centralize and disseminate information on possible imported parasites. Although the *IPPC* is binding, the standards are not; the standards were adopted by consensus at the FAO conference and are subject to periodic revision by the FAO committee of experts on phytosanitary measures. The *IPPC* was amended in 1979, in 1991, and in 1997 in order to reflect the IPPC's relationship to the *SPA*.

***Codex Alimentarius* Commission**

Date founded: 1962

Signatory countries: 165, as at June 1999

Type: Commission founded and funded by the WHO and the FAO

> Purposes: To set normative standards, to make recommendations, and to establish a code of usage for food products on which countries may agree, in order to protect consumer health and ensure fair trade practices in food products.

Description: The *Codex Alimentarius* Commission was long an international forum on food quality for helping countries that wished to do so to develop domestic regulations. Since the *SPA* was signed, the *Codex Alimentarius* Commission has become more of an organization for harmonizing domestic standards and setting international ones. It is made up of the following entities: a Commission of all member countries that meets biennially and makes final decisions on whether to adopt conclusions; an Executive Committee made up of 10 members representing the geographic areas (Africa, Latin America and the Caribbean, North America and the Pacific, and Europe) that prepares conclusions and directs the overall work of the Commission; expert committees on commodities such as milk and seafood; five committees on specific issues in the various geographic areas; and a secretariat in Rome. By 1995, the Commission had produced 28 volumes of standards, recommendations and principles, including 237 food standards, 41 sanitary and technological practice codes, evaluations of over 700 food additives and contaminants, and over 3,200 pesticide MRLs.

International Office of Epizootics (IOE)

Date founded: 1924

Signatory countries: 152, as at March 1999

Type: Non-UN organization, funded by member countries' contributions

Purposes: To facilitate trade in animals and animal products, while protecting consumer health and avoiding the spread of epizootics (epidemics among animals).

Description: The IOE is primarily an international animal health observatory. Its main mission is to inform domestic veterinary organizations about animal diseases. It also sets standards, including the international zoosanitary code, which sets recommended sanitary standards for international trade in animals and animal products; and defines the conditions under which an area may be declared disease-free. The IOE is made up of: elected commissions (a standards commission; a commission on foot-and-mouth disease and other epizootics; and a commission on fish diseases), four working groups (on biotechnology; computers and epidemiology; veterinary drug registration; and diseases of wild animals), which help disseminate information in member countries; and regional offices that help control disease more effectively.

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(1) In the case of butter, for example, under minimum market access a certain quantity may be imported into Canada free of prohibitive tariffs; however, quantities imported over and above minimum market access are subject to a high tariff of approximately 300%, in order to protect domestic production.

(2) In November 1998, France imposed a two-year moratorium on all

varieties of genetically modified canola thereby implicitly banning all exports of Canadian canola to Europe. Austria and Luxembourg have also banned some GMOs.

(3) At their most recent meeting in February 1999 in Cartagena, Colombia, the 138 participating governments were unable to reach agreement on a final text of this protocol and suspended negotiations. The protocol is being developed under the 1992 *Convention on Biodiversity*.

(4) The *SPA* Committee, created in 1995, is not only the group responsible for *SPA* implementation, but also a forum for intergovernmental discussions to solve specific technical and co-ordination problems.

(5) The *SPA* provides that a country must notify all interested member countries as soon as it takes or amends sanitary or phytosanitary measures.

(6) Wayne Jones, OECD Directorate for Food, Agriculture and Fisheries, "Food Safety: Protection or Protectionism?," *OECD Observer*, No 216, March 1999.

(7) The JECFA and the JMPR are expert committees that issue toxicology evaluations, the JECFA for food additives, contaminants, and veterinary drugs, and the JMPR for pesticides. Although these committees are independent of the *Codex Alimentarius* Commission, the Commission relies on their recommendations in setting its standards.

(8) Jean-Christophe Bureau, France's Institut national de la recherche agronomique (INRA), *Les négociations internationales sur le commerce : enjeux, débats en cours, et questions à l'INRA; aspects réglementaires techniques et sanitaires* [the international trade negotiations: issues, current debates, and questions to the INRA; technical and sanitary aspects of regulations] Conseil scientifique de l'INRA, February 1998.

(9) *Ibid.*

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